No. 95-388

(16)

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et. al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC. *d/b/a*
WASHINGTON REDSKINS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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February 16, 1996

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No. 95-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ANTONY BROWN, *ET AL.*,

PETITIONERS,

VS.

PRO FOOTBALL, INC. D/B/A
WASHINGTON REDSKINS, *ET AL.*,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL HOCKEY LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief in support of respondents is submitted in accordance with Rule 37 of the Rules of this Court. The National Hockey League ("NHL") has obtained and filed herewith the written consent of petitioners and respondents to the submission of this brief.

INTEREST OF AMICUS CURIAE

The determination of this case will have direct implications for the NHL, whose member clubs, like those in all other professional team sports, have engaged in multiemployer bargaining with their players for over two decades. Reversal of the decision below would throw labor relations in professional sports into chaos, and would render the NHL and other sports leagues vulnerable to antitrust attack if their member clubs, after the expiration of a collective bargaining agreement, and while bargaining in complete good faith to reach a new agreement, complied with their traditional labor law duty of continuing in effect the pre-expiration terms and conditions of employment, or exercised their rights under the labor laws collectively to implement new terms following a good faith bargaining impasse. That result would have a significant and deleterious impact on professional sports, a multi-billion dollar worldwide industry in which the NHL plays a significant role.

The NHL joins in the arguments made by respondents and the other *amici* urging affirmance, and submits this brief to bring to the Court's attention important facts regarding its own experience in the most recent round of collective bargaining in hockey. Of particular importance is that (i) the efforts of the National Hockey League Players Association ("NHLPA") to inject the antitrust laws into the collective bargaining process had the effect of hindering, not furthering, that process, and created the conditions that required the NHL to consider implementing revised employment terms, (ii) the NHL's unilateral implementation of collective bargaining proposals was the catalyst that brought the union back to the bargaining table, and (iii) two recent labor-management disputes in the hockey industry have been resolved by traditional labor law remedies, and not by wasteful antitrust litigation.

ARGUMENT

The court below specifically referred to the NHL's recent labor dispute as evidence that the collective bargaining process could succeed without the intrusion of the antitrust laws. *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1058 (D.C. Cir. 1985) ("we think the recently resolved labor dispute in the National Hockey League illustrates that collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution in professional sports"). Indeed, that experience—a totally distorted and inaccurate version of which appears in Petitioners' Brief (at 43-44 & n.28) and in the brief submitted by the NHLPA and other professional sports unions[1] as *amici curiae* (at 14-15)—offers a vivid demonstration of why the scope of the labor exemption as defined by the Court below, by the Second Circuit in *National Basketball Ass'n v. Williams*, 45 F.3d 684, 692 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137) and by the Eighth Circuit in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), fosters, and does not undermine, the collective bargaining process.

The NHL-NHLPA Negotiations

Following a 10-day player strike in 1992, the NHL and NHLPA entered into a collective bargaining agreement that expired on September 15, 1993. Negotiations toward a successor agreement began a few months prior to the expira-

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[1] The NHLPA submitted a joint *amicus curiae* brief with the players' unions for the other three major sports leagues (the Major League Baseball Players Association, the National Football League Players Association and the National Basketball Players Association) (hereinafter cited as "NHLPA Br. at __").

tion date. From the outset of the negotiations, the NHLPA maintained that any continuation in effect of the terms and conditions of the expired agreement would constitute an antitrust violation and could expose the NHL and its member clubs to treble damage liability. (NHL App. 1a-2a.)[2] This position, of course, had no support in law, and had continually been rejected by courts in cases both in and outside of professional sports.[3] In fact, throughout the negotiations, the union threatened antitrust litigation if the League continued in effect the pre-expiration terms and conditions of employment (as it was required to do under the labor laws) or instituted new terms and conditions of employment following impasse (as it was entitled to do under the labor laws).

Consistent with its contemplated litigation strategy, the NHLPA delayed in providing the NHL with a comprehensive set of proposals, and then refused to discuss its proposals—despite the continuing insistence of the NHL that it do so—until December 1993. In January 1994, the NHL proposed a system for acquiring, retaining and compensating players that was premised on the concept that player compensation should be linked with revenues. At the outset of the next bargaining session, the NHLPA rejected this proposal

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[2] Pertinent documents are reproduced in an Appendix to this Brief (cited herein as "NHL App. at __").

[3] *See Powell v. National Football League*, 930 F.2d at 1300-04; *Amalgamated Meat Cutters & Butchers Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979); *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004, 1006-07 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 373 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963); *Clune v. Publishers' Ass'n*, 214 F. Supp. 520 (S.D.N.Y.), *aff'd*, 314 F.2d 343 (2d Cir. 1963).

summarily, and claimed—before even one minute of discussion on the League's proposals—that the parties were at impasse and that further bargaining would be futile.

Beginning in March 1994, the NHLPA simply refused to bargain with the NHL, insisting that "impasse" had been reached and that it would not return to the bargaining table until the NHL had unconditionally and permanently withdrawn any proposed system that would link, in any way, player salaries and revenues. (NHL App. 3a-4a.) It assumed this posture after only three perfunctory bargaining sessions concerning the League's proposal, with no suggestion that the NHL was not bargaining in good faith, and with no effort whatsoever to invoke any of its remedies under the labor laws. For five months thereafter, the union refused even to meet with the NHL, notwithstanding numerous requests from the League to resume negotiations.

On July 18, 1994, the NHL (a) advised the union that, because of its refusal to bargain, the League had been left with no alternative but to propose significant changes to other terms and conditions of player employment, and (b) submitted to the union a broad range of economic proposals, including the elimination of salary arbitration, the elimination of *per diem* allowances, and substantial reductions in pension and insurance costs. The NHLPA did not respond. Accordingly, in light of the union's refusal to bargain in any meaningful way, the NHL advised the NHLPA on August 1, 1994 that it intended to implement many of the League's July 18 proposals when training camps opened for the upcoming season if a new collective bargaining agreement was not reached by that time. (NHL App. 5a-10a.) This exercise of labor law rights prompted the NHLPA, following five months of recalcitrance, to agree to return to the bargaining table.

Thus, it was only after the NHL had announced that certain changes in working conditions would be unilaterally implemented at the start of training camp that the union returned to the bargaining table. When those negotiations failed to produce an agreement, the NHL both implemented certain revised terms for the 1994 training camps, and then further exercised its labor law rights, locked out the union members, and announced that the 1994-95 season would not commence until a new collective bargaining agreement was reached.

We emphasize that the NHL did not take this action because it feared antitrust challenge to the necessarily common terms and conditions of employment it had implemented;[4] indeed, judicial decisions already rendered in *Powell* and *Williams* had suggested there would be no such risk of liability. Rather, the NHL chose to lock out because had it permitted the players to return to work, it feared that the union would, in false reliance on a possible antitrust remedy, engage in the same desultory pattern of sham bargaining that had characterized its conduct throughout 1994, or engage in a late strike as it had in 1992. Ultimately, the NHL concluded that a combination of unilateral implementation *and* other traditional economic weapons would best force meaningful bargaining and lead to a collective agreement.

After a three-month lockout—with no antitrust litigation—the parties reached a new collective bargaining agree-

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[4] Petitioners quote the statement of one club's general manager as "evidence" of this purported fear. (Petitioners' Br. at 43-44 n.28; *see also* NHLPA Br. at 15 n.4). That general manager, however, simply observed that the NHL does not have baseball's complete exemption from the antitrust laws, not that the labor exemption—as interpreted consistently to date—would not protect the NHL from an antitrust suit.

ment on January 13, 1995, and the NHL season commenced shortly thereafter. The new agreement represents a compromise by both sides and is a product of conventional and widely accepted labor relations tactics with no interference from the antitrust laws.

Significance of the NHL-NHLPA Experience

The NHL-NHLPA experience confirms both the destructive influence of the antitrust "threat" and the benefits to the negotiating process if each side is permitted to exercise, or threaten to exercise, its fundamental labor law rights.

The players' professed desire to vindicate their "antitrust rights" did nothing to help the collective bargaining process. To the contrary, it had at least two pernicious effects. First, the effort to create an artificial impasse to preserve some prospect of antitrust litigation resulted in either an outright refusal to negotiate or meaningless and perfunctory bargaining as the NHLPA tried to enhance its litigation posture by engineering an end to the nonstatutory labor exemption. Second, the specter of antitrust litigation corroded the negotiations themselves, and caused the suspension of the bargaining process for months at a time as the players steadfastly refused to bargain, presumably out of the fear that doing so would have broken the impasse, and thereby reinstated the labor exemption.

In contrast, and contrary to petitioners' statement (Petitioners' Br. at 36), there can be no question that the unilateral implementation of terms and conditions of employment by the NHL in August 1994 *stimulated* the bargaining process and immediately brought the NHLPA back to the table after a five-month antitrust-inspired hiatus, breaking the artificial impasse. It cannot be overlooked that the head of the union contacted the NHL Commissioner to renew negotiations

within days of being advised of the League's intention to alter employment terms unilaterally. Moreover, if the NHL had not exercised its right unilaterally to implement or lock out, it would have had no choice, given the clear need for common and uniform employment terms, to have continued in effect the pre-expiration terms and conditions of employment. Thus, it was the utilization of labor law weapons—not antitrust threats—that brought about agreement. If anything, the antitrust overlay delayed the parties from reaching a new agreement.

Petitioners' assertion that members of a multiemployer group can avoid antitrust liability by the simple expedient of individually implementing their own employment terms (Petitioners' Br. at 40) displays either their disingenuousness or a remarkable lack of understanding of both the labor laws and the antitrust laws. After impasse, employers are entitled to implement new terms of employment at impasse, but only to the extent that they were reasonably comprehended within the scope of its pre-impasse proposals. *See, e.g., Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 381 (1965)).

If individual clubs in a sports league engage in multiemployer bargaining—as courts have suggested they *must*[5]—and if they jointly submit proposals to the players union, the players would undoubtedly contend that whatever terms each club implemented post-impasse on a purportedly "individual" basis were the result of conscious parallelism or somehow otherwise reflected the collusive conduct barred by the Sherman Act. Moreover, it would completely undermine

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[5] *See National Basketball Ass'n v. Williams*, 45 F.3d at 692; *North Am. Soccer League v. NLRB*, 613 F.2d 1379, 1382-83 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

the stability of multiemployer bargaining if employers were forbidden from implementing new terms and instead were compelled to employ more drastic means, such as work stoppages.

Likewise, petitioners' contention that unilateral implementation is a one-sided measure that carries no risks for management (Petitioners' Br. at 36) flies in the face of federal labor law. Obviously, unilateral implementation may serve as provocation for a strike, a significant risk for employers, particularly in a non-essential and highly competitive business such as entertainment. In addition, as this Court has held, management's right at impasse to implement new terms of employment counterbalances the union's additional right at impasse, as a general matter, to make interim agreements with individual members of the multi-employer unit (*i.e.*, the right to "whipsaw" management). *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 416-17 (1982).

The overall experience of the NHL and NHLPA in their recent labor negotiations therefore demonstrates that (a) the federal labor laws provide all the economic weapons employees and employers need to counterbalance one another, including unilateral implementation of terms and conditions of employment, and (b) affording at impasse union members an additional weapon—the antitrust laws—would have *de*structive, not *con*structive, consequences for labor relations.

CONCLUSION

For the foregoing reasons and those set forth in the Brief for Respondents, in which we join, *amicus curiae* National Hockey League respectfully submits that the court below delineated the proper boundary for termination of the nonstatutory labor exemption. The judgment of the Court of Appeals therefore should be affirmed.

Respectfully submitted,

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February 16, 1996

APPENDIX

NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION
One Dundas Street West, Suite 2400, P.O. Box 84, Toronto, Canada M5G 1Z3
Telephone: (416) 408-4040 FAX: (416) 408-3685

September 15, 1993

Commissioner Gary B. Bettman
National Hockey League
650 Fifth Avenue
33rd Floor
New York, NY 10019-6108

Via Fax

RE: Expired Collective Bargaining Agreement

Dear Gary:

At the end of the day today, the Collective Bargaining Agreement ("CBA") between the National Hockey League Member Clubs and the National Hockey League Players' Association will expire. To ensure that there are no misunderstandings, this letter will summarize the players' position now that the CBA is about to end.

First, the Association is ready to continue to negotiate in good faith after the CBA expires. However, consistent with the Players' Association's position throughout negotiations, now that the CBA has expired, please understand that we do not agree or consent to a continuation of those terms of the expired CBA that establish restraints on competition for player services. We also expressly waive any rights under the labor laws that we may have to object to a change to such restraints prior to a lawful impasse. Accordingly, any continued adherence to those restrictions on player movement will constitute unilateral action on the part of the owners. And, as we have advised you in the past, the Players' Association believes that any unilateral imposition by the owners of restrictions on player movement violates the antitrust laws.

Second, as reflected by our August 18, 1993 proposal, the only type of system governing player movement that the Players' Association will accept is one that provides meaningful and significant free

agency during a player's career. Anything short of such a system is totally unacceptable.

We look forward to resuming negotiations.

Yours very truly,

NATIONAL HOCKEY LEAGUE
PLAYERS' ASSOCIATION
/s/
Robert W. Goodenow
Executive Director and General Counsel

NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION
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Telephone: (416) 408-4040 FAX: (416) 408-3685

May 18, 1994

Jeffrey Pash, Esq.
Senior Vice President/
General Counsel
National Hockey League
650 Fifth Avenue
New York, NY
10019

Via Telecopier
212-636-0287

Dear Jeff:

I am writing in response to your letters of May 4, 1994. First, with respect to "Games 83 and 84" and "international hockey," I think we have each made our differing legal positions clear several times and endless letters repeating these positions seems pointless to me.

With respect to my letter of April 27th, as to which you claim puzzlement, I am even more puzzled by your strained efforts to avoid a direct response. On behalf of the players and agents who are directly affected, I simply asked that you advise us of whether the Clubs plan to follow the previous "critical date calendar." I find your refusal to tell me yes or no frankly inexplicable. We had hoped to be able to inform the agents of your intentions at our upcoming agent meeting next week.

We of course vigorously disagree with your assertion that the parties are not at an impasse in bargaining. Again, there is nothing to be gained by debating the point. As you must know, the parties are in complete disagreement over the seminal "system" issues which have been the central focus of negotiations i.e. the NHL's insistence on a system where players salaries are tied to revenues, thereby resulting in any form of salary "cap." The record -- and the law -- could not be more clear at this point that an impasse has in fact been reached.

Similarly, I categorically reject your misleading characterization of the NHLPA's current stance as a "refusal to meet" with you over "any aspect of" the expired CBA. Precisely because the parties are at loggerheads on the central systematic issue in the negotiations no productive purpose would be served in meeting or negotiating on the multitude of secondary issues. However, as we told you repeatedly during our several bargaining sessions on the issue, we will gladly meet to discuss other issues if and when the Clubs withdraw their absolute insistence on a system where player salaries are tied to revenues, thereby resulting in any form of salary "cap." We still remain willing to meet if the Club retreat from that position.

Finally, with respect to your request for me to advise you about any future litigation plans of the NHLPA or individual players, as you know, under applicable law the NHLPA has no standing to bring an action under the antitrust laws regarding restrictions on players. With regard to suits by individual players, that is a matter that is up to them.

Yours very truly,

NATIONAL HOCKEY LEAGUE
PLAYERS' ASSOCIATION
/s/
Robert W. Goodenow
Executive Director and General Counsel

RWG/llh

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Jeffrey Pash Senior Vice President, General Counsel

August 1, 1994

BY FACSIMILE AND FIRST CLASS MAIL

Robert Goodenow
Executive Director and General Counsel
National Hockey League Players' Association
One Dundas Street West, Suite 2400
Toronto, Ontario M5G 1Z3
CANADA

Dear Bob:

The NHLPA's refusal to meet for almost five months, and total silence during the two weeks since receiving our revised collective bargaining proposals, has not caused us to withdraw our system proposal reflected in our letter of January 12th. To the contrary, we continue to believe that the League and the NHLPA must work together to redesign the system under which the clubs and the players operate so as to ensure an equitable sharing of the growth from the successes we hope to enjoy.

Given the NHLPA's apparent disinterest in negotiating over revised economic terms and other working conditions, we evidently must, one month before the scheduled opening of training camp, decide on our own what those terms and conditions will be. In this context and most reluctantly, this is to advise you that, absent an agreement to the contrary, it is the League's intention to implement, effective with the start of training camp, the following from the proposals enclosed with my letter of July 18:

6. We propose to reduce Player Finish and Other Money Awards ("Player Fund") under Article IX of the MOU to

$2 million (mixed) to be payable to the finalists in the Stanley Cup competition.

7. We propose to eliminate the present multiple contract forms, and replace them with a single Standard Player Contract form with a fixed term and no fixed options. All options, all skill guarantees, and all injury guarantees that extend beyond hockey-related illness and injury must be individually negotiated. Contracts will automatically be deemed "two way" contracts in the event of assignment to the minor leagues. Contract addenda (except as to compensation terms) will be in standard form.

   Contracts and addenda must be approved by the Commissioner and registered with the League. Copies will be furnished to NHLPA, and each party may continue to disseminate contract information to their members and affiliates.

8. Salary Arbitration – We propose to eliminate this Article.

9. Medical Care –

   a. We propose to continue to provide the medical, dental and hospitalization coverages as at present. The League may provide these benefits through its captive (I.C.E.) or another insurer of its choosing, and may administer the plan directly, through an insurance company, or through a third party administrator.

   b. We propose that deductibles in the amount of $750 per person and co-insurance of 70%–30% to $10,000 will be implemented with the next plan year. Clubs may reopen this Article upon passage of a national health insurance program in the U.S.

c. We propose to continue to provide these coverages with no premium cost sharing in the case of players earning $350,000 or less. Players earning more than $350,000 will pay their own premiums.

d. We propose that insurance for retired players shall be continued, with the retired participants and their dependents constituting a separate actuarial experience pool and with separately determined premiums.

10. Pension –

a. Without prejudice to our position in any pension litigation, we propose to eliminate the senior player benefit.

b. We propose to make the pension plan contributory for players earning in excess of $350,000. Such players would be required to contribute 50% of the annual contribution necessary to fund their yearly pension accrual.

c. We propose that the Clubs shall not be obligated to make pension contributions until a player has played 80 games in the NHL.

11. Insurance – We propose to continue to provide the life and career ending disability insurance coverages as at present. Players earning more than $350,000 will pay their own premiums.

12. Traded Players – We propose to delete paragraphs 4, 5 & 8 of the MOU and substitute an obligation to pay rent of up to $1,500 per month for two months or the earlier date on which the player is no longer obligated with regard to his former residence.

15. Roster Size – We propose that the active roster be 17 skaters and two goaltenders. We further propose that each Club be limited to a total of twenty-two players on its major league roster at any given time.

16. Per Diem Allowance – We propose to eliminate Article XVII.

17. Training Camp – We propose to delete a) paragraph 20.01 and substitute the obligation to provide transportation or reasonable travel expenses from the Club's home city to its training camp; b) the references to per them allowance in paragraph 20.02(d), (e) & (f); and (c) paragraph 20.03(a), (b), (c), and (d) and substitute the discretion of the NHL to permit veteran player mini-camps, and rookie and new coach training camps.

18. Player Discipline – We propose to increase the Commissioner's fining authority to $50,000. Suspensions shall result in the loss of 1/84 of annual salary per game suspended in the 1994-95 season and 1/82 thereafter.

19. Currency – We propose that upon the trade of a player between a Canadian Club and a U.S. Club, the amount of player's salary, bonuses and other financial benefits, if any, shall automatically be converted to the currency of the country to which the player was traded, at the rate of exchange then in effect as announced by the Wall Street Journal.

20. International Hockey – We propose to delete all references to the International Committee and substitute the NHL and delete paragraphs 16.01(c), 16.02 and 16.05.

21. Games 83-84 – We propose to delete, effective with 1995-96 season.

22. Player Appearances/Participation –

a. We propose to clarify paragraph 2 of the Standard Player's Contract to explicitly provide for up to eight appearances for any and all of the following:

(i) appearances on behalf of the League, including appearances at commercial establishments;

(ii) public service appearances and community service initiatives;

(iii) events (including hospitality, promotional and charity events) connected with the All Star Game, out of venue games in North America and over-seas, and other League related special events;

(iv) hockey clinics;

(v) special videotape projects and programs.

b. We propose to clarify paragraph 2 of the Standard Player's Contract to explicitly provide that:

(i) a player must make himself available to attend and participate in the Skills Competition and local youth hockey exhibitions;

(ii) a player must make himself available to attend and participate in all press conferences, including weekly, post-game and post-practice press brief-ings;

(iii) a player must make himself available to participate in the Hockey Hall of Fame Game. We further propose that the Hockey Hall of Fame Game will not be considered an exhibition game for purposes of any provision of the SPC or CBA.

23. Uniform and Equipment –

a. We propose to clarify that the League has the right to determine the type of outerwear and protective gear that players will wear on the ice, including the manufacture and brand name of such uniform and protective gear, as well as equipment.

b. We propose to clarify that the League has the right to require that all players wear only official Stanley Cup or Center Ice merchandise in the arena, practice areas, and all hockey related areas.

c. We propose to clarify that the League has the right to establish, for safety reasons, uniform standards for helmets and other on-ice equipment. Players will be required to use only equipment that satisfies these standards.

I emphasize that it is not our preference to proceed this way. Indeed, we prefer not to make any changes without the involvement and agreement of the NHLPA, It is only the NHLPA's consistent refusal to meet and negotiate which makes this action necessary. We would prefer to begin immediately, for as long as it takes, locked in a conference room with you, negotiating a new collective bargaining agreement. Until the NHLPA is prepared to join us in that effort, we have no alternative but to proceed on our own.

Very truly yours,
/s/
Jeffrey Pash

cc: Gary B. Bettman, Esq.